

STATE OF MICHIGAN
COURT OF APPEALS

STEPHEN J. MATTICHAK,

Plaintiff-Appellant,

v

MCLAREN MEDICAL GROUP,

Defendant-Appellee.

UNPUBLISHED

April 10, 2018

No. 338536

Bay Circuit Court

LC No. 16-003463-NZ

Before: SERVITTO, P.J., and MARKEY and O'CONNELL, JJ.

PER CURIAM.

Plaintiff, Stephen J. Mattichak, appeals as of right the trial court's grant of summary disposition under MCR 2.116(C)(8) (failure to state a claim) in favor of defendant, McLaren Medical Group (McLaren). McLaren terminated Mattichak's employment. The trial court rejected Mattichak's claims that McLaren violated The Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*, and that McLaren wrongfully discharged Mattichak in violation of public policy. We affirm.

I. BACKGROUND

Mattichak worked at McLaren's Bay Heart and Vascular Office, and he was on staff at McLaren Bay Region. In March 2016, while Mattichak and his wife were in the middle of a divorce, the director of the office received an anonymous letter accusing Mattichak of having an extramarital affair with another McLaren employee. In May 2015, Mattichak's wife's attorney issued a subpoena to McLaren Bay Region requesting the production of documents related to Mattichak's meetings, conferences, and schedules, in addition to any complaints made against Mattichak. When Mattichak arrived at work one morning in June 2016, the subpoena was in an open envelope on his desk. That afternoon, McLaren terminated Mattichak's employment without cause.

Mattichak filed a complaint against McLaren in July 2016, alleging a violation of the WPA. McLaren subsequently moved for summary disposition under MCR 2.116(C)(8), arguing that Mattichak failed to state a claim because participation in divorce proceedings is not protected activity under the WPA. The trial court agreed with McLaren and granted its motion for summary disposition.

Mattichak subsequently amended the complaint with the trial court's permission to allege wrongful discharge in violation of public policy. Mattichak contended that McLaren's termination decision violated Mattichak's federal First Amendment right to petition the government and federal Fourteenth Amendment right of access to the courts to seek a divorce. McLaren again moved for summary disposition under MCR 2.116(C)(8), arguing that the First and Fourteenth Amendments do not apply to private conduct. The trial court agreed that Mattichak did not identify a statutory provision supporting a public policy violation. The trial court added that discharge for participation in a divorce proceeding did not give rise to a viable claim of a violation of public policy.

II. DISCUSSION

A. STANDARD OF REVIEW

This Court reviews de novo a grant of summary disposition, *Thomas v State Bd of Law Examiners*, 210 Mich App 279, 280; 533 NW2d 3 (1995), and questions of statutory interpretation, *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 570; 753 NW2d 265 (2008). Summary disposition under MCR 2.116(C)(8) is warranted if "[t]he opposing party has failed to state a claim on which relief can be granted." Courts may only consider the pleadings when ruling on a motion based on subrule (C)(8). MCR 2.116(G)(5). The Court must accept all well-pleaded factual allegations as true and construe them in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Summary disposition under subrule (C)(8) is proper if "the claim is so clearly unenforceable as a matter of law that no factual development would possibly justify recovery." *Thomas*, 210 Mich App at 280.

"The goal of statutory interpretation is to determine and give effect to the intent of the Legislature, with the presumption that unambiguous language should be enforced as written." *Kimmelman*, 278 Mich App at 571. If the statute is unambiguous, this Court applies the statute as written. *Id.*

B. PROTECTED ACTIVITY

Mattichak first argues that the trial court erred by ruling that the activity protected by the WPA did not include participating in a divorce proceeding. We disagree.

Section 2 of the WPA contains the following prohibition:

An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action. [MCL 15.362].

A “plaintiff must show that (1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action.” *West v Gen Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003).

Mattichak describes his whistleblower claim as a type two claim. This Court described two types of whistleblowers: type one whistleblowers initiate a report about a violation of law, while type two whistleblowers “participate in a previously initiated investigation or hearing at the behest of a public body.” *Henry v Detroit*, 234 Mich App 405, 409-410; 594 NW2d 107 (1999). The WPA does not require a type two whistleblower “to report or testify regarding a violation or suspected violation of a law, regulation, or rule.” *Shaw v City of Ecorse*, 283 Mich App 1, 11; 770 NW2d 31 (2009). The WPA does not require the protected activity to relate to an “employee’s assigned or regular job duties.” *Brown v Mayor of Detroit*, 478 Mich 589, 596; 734 NW2d 514 (2007).

In this case, the trial court correctly applied the unambiguous language of the WPA to reject Mattichak’s claim because he initiated the divorce proceeding. Accordingly, Mattichak was not “*requested by* a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.” See MCL 15.362 (emphasis added). In addition, Mattichak’s wife’s divorce lawyer issued the subpoena to McLaren Bay Region, not to Mattichak, so the subpoena did not request Mattichak’s participation. In short, the trial court did not err by applying the plain language of the WPA to conclude that Mattichak was not engaged in protected activity.

Mattichak criticizes the trial court’s invocation of the “absurd result rule,” but the trial court applied the plain language of the WPA after remarking that the WPA was not intended to extend to a divorce proceeding. Accordingly, the trial court did not rely on the “absurd result rule.” Likewise, the trial court did not evaluate Mattichak’s motive, and Mattichak did not engage in protected activity, regardless of motive. See *Whitman v City of Burton*, 493 Mich 303, 313; 831 NW2d 223 (2013) (ruling that motive was irrelevant to whether an activity is protected by the WPA). Therefore, Mattichak’s argument that the protected activity need not arise from an altruistic motive is irrelevant. In short, Mattichak has identified no error in the trial court’s grant of summary disposition regarding his WPA claim.¹

C. PUBLIC POLICY VIOLATION

Mattichak argues that his wrongful discharge violated public policy. We disagree.

If the WPA does not apply, a plaintiff may bring a public policy claim to challenge a retaliatory discharge. *Anzaldúa v Neogen Corp*, 292 Mich App 626, 631-632; 808 NW2d 804 (2011). An “employer is not free to discharge an employee at will when the reason for the

¹ For these reasons, the trial court did not abuse its discretion by denying reconsideration. See *Luckow Estate v Luckow*, 291 Mich App 417, 423; 805 NW2d 453 (2011) (reviewing a motion for reconsideration for an abuse of discretion).

discharge contravenes public policy.” *McNeil v Charlevoix Co*, 484 Mich 69, 79; 772 NW2d 18 (2009). An at-will employee can claim wrongful discharge in violation of public policy “when (a) a statute specifically prohibits the discharge, (b) the employee is discharged for refusing to violate the law, or (c) the employee is discharged for exercising a well-established statutory right.” *Lewandowski v Nuclear Mgt Co, LLC*, 272 Mich App 120, 127; 724 NW2d 718 (2006).

In this case, the trial court rejected Mattichak’s reliance on the First and Fourteenth Amendments of the United States Constitution as the source of public policy that McLaren violated by terminating his employment. A constitutional right that does not extend to private conduct does not give rise to the public policy exception to at-will employment. *Prysak v RL Polk Co*, 193 Mich App 1, 9-10; 483 NW2d 629 (1992). Neither the First Amendment nor the Fourteenth Amendment extends to private conduct. See *Woodland v Mich Citizens Lobby*, 423 Mich 188, 203; 378 NW2d 337 (1985) (First Amendment); *Nat’l Collegiate Athletic Ass’n v Tarkanian*, 488 US 179, 191; 109 S Ct 454; 102 L Ed 2d 469 (1988) (Fourteenth Amendment).

In addition, in *Prysak*, 193 Mich App at 10 n 1, even assuming that the First Amendment gave rise to a public policy violation, this Court noted that the plaintiff’s “proposed speech did not involve a matter of public concern, but was regarding a private matter,” when it rejected the plaintiff’s public policy claim. Therefore, the Court concluded, the employer’s alleged interference was “not so contrary to the public policy of this state as to be actionable.” *Id.* Similarly, in this case, Mattichak asserted constitutional rights that do not apply to his private employer, and his divorce proceeding was a private matter wholly unrelated to his employment. Mattichak identifies no contrary case law and no sound legal basis for his argument. Accordingly, the trial court did not err by rejecting Mattichak’s wrongful discharge claim on the basis of his constitutional rights.

We affirm.

/s/ Deborah A. Servitto
/s/ Jane E. Markey
/s/ Peter D. O’Connell